



1900 K Street, NW
Washington, DC 20006-1110
+1 202 261 3300 Main
+1 202 261 3333 Fax
www.dechert.com

JOSHUA D.N. HESS

joshua.hess@dechert.com
+1 202 261 3438 Direct
+1 415 262 4555 Fax

February 6, 2017

VIA ECF

Molly Dwyer
Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Northstar Financial Advisors, Inc. v. Schwab Investments, et. al.*, No. 16-15303

Dear Ms. Dwyer

Appellees respectfully submit the Seventh Circuit's recent opinion in *Holtz v. JPMorgan Chase Bank, N.A.*, No. 13-2609, (7th Cir. Jan. 23, 2017) as supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j) and 9th Cir. Rule 28-6. *Holtz* unanimously affirms a case Appellees cited favorably in their answering brief. *See* ECF No. 14 at 27.

Holtz rejects Appellants' suggestion that characterizing their claim as a "breach of contract" saves them from SLUSA preclusion. Slip Op. at 4. Instead, SLUSA precludes "[c]laims based on false statements in (or material omissions from) a [mutual fund] prospectus" and "it does not matter what state-law characterization might be possible." *Id.* at 6. Indeed, SLUSA preclusion applies even where the same facts give rise to both federal securities and common-law claims. *Id.* at *8. Further, *Holtz* reinforces the notion that "a decision *not* to sell a security (when influenced by a material misrepresentation or omission)" presents a securities claim that falls within SLUSA. *Id.* at 10. Indeed, the Seventh Circuit was unaware of any "nondisclosure or fiduciary-duty claim concerning investments in securities, traded in interstate commerce" that was ever found to be "outside the scope of federal securities law." *Id.* at 9. *Holtz* also makes clear that SLUSA has no scienter pleading requirement. *Id.* at 3. Lastly, *Holtz* rejects any suggestion that SLUSA preclusion leaves litigants without a remedy because it only bars class actions and a litigant may still pursue an individual lawsuit or the SEC or a State could institute their own actions. *Id.* at 11.

Appellants allege state-law claims based on allegations that Appellees promise one investment strategy and then secretly employed another. As in *Holtz*, "nondisclosure is a linchpin of this suit no matter how [plaintiff] chose to frame the pleadings" because there would be no claim if plaintiff chose to hold his shares with full knowledge of the fund's investment practices. *Id.* at 3.



February 6, 2017
Page 2

Holtz reaffirms that such claims are precluded under SLUSA. *Id.* at 6 (a party may not “recharacterize as a state-law claim a situation that securities law sees as a nondisclosure claim”).

Sincerely,

/s/ Joshua D.N. Hess
Joshua D.N. Hess

JDH/br

cc: All Counsel of Record via ECF